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June 10, 2016

Mr. Thomas Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

In recent months, I have heard from many Kentuckians expressing their opposition to the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking on Navigation Devices, more commonly known as the "set-top box" proceeding. I write to say I share those concerns and encourage the FCC to reconsider moving forward.

In the last decade, we have witnessed a revolution in how Americans receive news, sports, and entertainment content. A few years ago, most video programming was only widely available at the time of broadcast via a television that was wired to a cable or satellite feed. Today, millions of consumers receive that same content on their phone, tablet, laptop, over-the-top streaming devices…wherever and whenever it works for them.

These advances are not the result of FCC mandates or congressional directives. Instead, they are the result of a free market in which content providers, programming distributers, device manufacturers, app developers, and consumers willingly agree to terms they each find beneficial. The content providers are compensated for their creativity through license agreements, the programming distributers provide valuable content to their customers, and the consumers can receive the content they enjoy in a time, place, and format of their choosing. As Commissioner O'Rielly recently noted, these advances are "due to disruptive technologies, not disruptive regulation."

Despite this progress, the FCC takes a markedly different direction in its proposed set-top box rule-making. Rather than applying a light regulatory touch, the FCC would require existing programming distributors to provide the copyrighted programming they have licensed from content providers to third party manufacturers and app developers, none of whom would be bound by the agreements to protect this content.

I am particularly concerned about the impact of these changes on small programming distributors and the customers in rural America, especially Kentucky. Even absent these new proposed mandates, providing video services in a rural area poses many challenges. As a number of Kentucky distributors have noted, the rural geography means higher costs to deploy fiber and their small customer bases means they frequently pay higher costs for content. The proposed set-top box regulations would add new costs for hardware and equipment that will inevitably be borne by consumers.

These problems with the proposal are not lost on Kentuckians. In recent months, I have heard from hundreds in Kentucky who are concerned about the impact of the content they enjoy, about the

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complexity of compliance, and about the potential added costs of new hardware to meet the new standards. And I hope the FCC will listen carefully to the myriad similar concerns raised by lawmakers and organization across the ideological spectrum and reconsider moving forward.

Thank you in advance for your attention in this matter.

Sincerely,

Mitch McConnell

MITCH McCONNELL
UNITED STATES SENATOR

MM/qs

cc: Mignon Clyburn, Commissioner, Federal Communications Commission
Jessica Rosenworcel, Commissioner, Federal Communication Commission
Ajit Pai, Commissioner, Federal Communications Commission
Michael O'Rielly, Commissioner, Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 11, 2016

The Honorable Mitch McConnell
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator McConnell:

Thank you very much for your letter sharing your views about how the Commission's proceeding for better fostering competition in the set-top box and navigation app marketplace might impact small pay-TV providers and the legal rights of copyright owners. I take your input on these issues seriously and assure you that it will receive careful consideration.

Section 629 of the Communications Act, adopted by Congress in 1996, requires the Commission to promote competition in the market for devices that consumers use to access their pay-television content. Yet, unfortunately, the statutory mandate in section 629 is not yet fulfilled. The lack of competition in this market has meant few choices and high prices for consumers. In a recent Rasmussen Report Study, 84 percent of consumers felt their cable bill was too high. One of the main contributing factors to these high prices is the no-option, add-on fee for set-top box rental that is included on every bill, forcing consumers to spend, on average, $231 in rental fees annually. Even worse, a recent congressional investigation found that the price of most equipment fees is determined by what the market will bear, and not the actual cost of the equipment.[1] With the lack of competition in this market, it should come as little surprise that fees for set-top boxes continue to rise.[2] Clearly, consumers deserve better.

This February the Commission put out for public comment a proposal that would fulfill the statutory requirement of competitive choice for consumers. This action opened a fact-finding dialog to build a record upon which to base any final decisions. Our record already contains more than 280,000 filings, the overwhelming majority of which come from individual consumers. FCC staff is actively engaged in constructive conversations with all stakeholders—content creators, minority and independent programmers, public interest and consumer groups, device manufacturers and app developers, software security developers, and pay-TV providers of all sizes—on how to ensure that consumers have the competition and choice they deserve. I am hopeful that these discussions will yield straight-forward, feasible and effective rules for all.

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[1] U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS COMMITTEE, MINORITY STAFF REPORT, INSIDE THE BOX: CUSTOMER SERVICE AND BILLING PRACTICES IN THE CABLE AND SATELLITE INDUSTRY, 17 (Jun. 23, 2016).

[2] One recent analysis found that the cost of cable set-top boxes has risen 185 percent since 1994 while the cost of computers, television and mobile phones has dropped by 90 percent during that same time period.

You shared your views about how this proceeding might affect the legal rights of copyright owners and creators. The FCC's authority to regulate communications has always existed alongside content owners' rights to control the duplication, distribution, or performance of their works. Starting with broadcast, and continuing with cable, satellite and the internet, the FCC has for more than 80 years regulated networks that content owners use to transmit their works to the public. In these activities, the Commission has always recognized the statutory rights of content owners and has pursued policies that encourage respect for these rights. In addition, several FCC-related statutes explicitly prohibit the alteration of broadcasts or the theft of cable transmissions that contain copyrighted works.

I share your goal of ensuring that the marketplace of legal copyrighted works is not harmed by our proceeding. And I am confident that these FCC-specific authorities and well-practiced contractual arrangements will continue to safeguard the legitimate interests of all of the participants in the video ecosystem. We have seen this work in the cases of the statutory regime governing must carry and of the essentially contractual regime governing retransmission consent, for example.

The goal of this rulemaking is to promote competition, innovation and consumer choice. I can assure you that we do not seek to alter the rights that content owners have under the Copyright Act; nor will we encourage third parties to infringe on these rights. All of the current players in the content distribution stream, including cable and satellite companies, set-top box manufacturers, app developers, and subscribers, are required to respect the exclusive rights of copyright holders. The rulemaking will require any companies that enter this market subsequent to our action to follow the same requirements.

I also share your interest in ensuring that we do not interfere with the licensing agreements and contractual arrangements between pay-TV providers and programmers. Licensing agreements in particular are used to establish usage terms for content that falls outside of the protections afforded by federal copyright law. I believe that such provisions should remain protected, and we are actively seeking input from the programming community on a number of methods to accomplish this.

While the protection of artistic work and the promotion of technological innovation may be presented as conflicting values, I believe that in many situations these two important policy goals can complement each other. While many people feared that the Sony Betamax would harm the ability of content owners to earn money through films and television, it actually created a brand new and profitable market – the videocassette and later the DVD market – for content owners. Our rulemaking will ensure that this rapidly-changing industry continues to strike the proper balance between property rights and consumer choice. None of us can predict exactly what the video marketplace will look like 10 or 20 years from now, but the goal of this rulemaking is that it will be a healthy ecosystem that supports a wide variety of diverse content and gives consumers many convenient ways to purchase and view this content.

I believe that we can foster competition that will improve consumer choice while respecting and protecting the exclusive rights of content creators. This is also the opinion of the Writers Guild of America, West (WGAW), who concluded the following in one of its filings in this proceeding: "[t]he proposed rules for a competitive navigation device market are a logical and necessary next step in giving consumers more choice and further opening the content market to competition. While fears of piracy have been raised in this proceeding, the WGAW's careful analysis is that the Commission's rules can promote competition *and* protect content."[3]

I also share your goal of ensuring that pay-TV subscribers in all parts of our country can enjoy the benefits of consumer choice without unduly burdening small providers. Recognizing the important role that small pay-TV providers play in many rural communities, the Notice of Proposed Rulemaking (NPRM) adopted in February seeks comment how this proceeding could affect these providers. Notably, the NPRM proposes to exempt all analog cable systems from new requirements while also seeking comment on the American Cable Association's proposal to exempt all pay-TV providers serving one million or fewer subscribers from any rules. The NPRM further asks how the Commission can ensure that any rules adopted are not overly burdensome to pay-TV providers. We are continuing to engage with all stakeholders on this issue, including small pay-TV providers. Customers of pay-TV providers of all sizes deserve choice and innovation, and I am confident that we will be able to find a balance that accurately reflects the technology and resources available to truly small providers.

The record we are developing will help us preserve strong copyright protections and avoid overburdening small pay-TV providers while delivering American consumers meaningful choice and opening new opportunities for minority and independent programmers. Thank you for your engagement in this proceeding, and I look forward to continuing to work with you on this important consumer issue.

Sincerely,

Tom Wheeler

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[3] Writers Guild of America, West Reply Comments, MB Docket No. 16-42, CS Docket No. 97-80, at 15 (May 23, 2016).